

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

LAUSTEVEION JOHNSON

Case No. 2:18-cv-01078-JCM-GWF

Plaintiff,

ORDER

v.

HIGH DESERT STATE PRISON, *et al.*,

Defendants.

14 Presently before the court is defendants James Dzurenda, Julio Calderin, Jennifer
15 Nash, Brian Williams, Jeremy Bean, Taylor Paryga, Anthony Ritz, Pamela Del Porto,
16 Harold Wickham, Sheryl Foster, Renee Baker, and Benjamin Estill's (collectively
17 "defendants") motion to revoke *pro se* plaintiff Lausteveion Johnson's pauper status.
18 (ECF No. 12). Johnson filed a response (ECF No. 15), to which defendants replied (ECF
19 No. 18).

20 Also before the court is defendants' motion for sanctions. (ECF No. 13). Johnson
1 filed a response (ECF No. 15), to which defendants replied (ECF No. 19).

Also before the court is Johnson's countermotion for sanctions. (ECF No. 15). Prior to the defendants' filing of their response (ECF No. 24), Johnson filed a "reply" (ECF No. 22). (ECF No. 23).

24 Also before the court is Johnson's "motion for oral arguments on all pending
25 motions." (ECF No. 28). Defendants have not filed a response and the time to do so has
26 passed.

1 Also before the court is Johnson's second motion for "oral argument on all pending
2 motions." (ECF No. 31). Defendants have not filed a response and the time to do so has
3 passed.

4 Also before the court is Johnson's motion for partial summary judgment. (ECF No.
5 33). In response, defendants have filed a motion to deny Johnson's motion for partial
6 summary judgment, or alternatively, for an extension of time to file an opposition to
7 Johnson's motion for partial summary judgment. (ECF No. 34).

8 The court finds that oral argument is not necessary to resolve these motions.

9 **I. Background**

10 On June 18, 2018, Johnson filed a motion/application for leave to proceed *in forma*
11 *pauperis* ("IFP application") (ECF No. 1) with an attached complaint (ECF No. 1-1) while
12 in the custody of the Nevada Department of Corrections ("NDOC"). Johnson filed an
13 amended complaint on February 6, 2019. (ECF No. 4-1). The court granted Johnson's
14 IFP application and issued its screening order on June 20, 2019. (ECF No. 7).

15 Now, defendants have filed a motion to revoke Johnson's pauper status (ECF No.
16 12) and a motion for sanctions (ECF No. 13). Johnson has filed a countermotion for
17 sanctions, as well as two motions for oral argument before a district judge. (ECF Nos.
18 15, 28, 31). Johnson has also filed a motion for partial summary judgment. (ECF No.
19 33). In response, defendants have filed a motion to deny Johnson's motion for partial
20 summary judgment, or alternatively, for an extension of time to file an opposition to
21 Johnson's motion for partial summary judgment. (ECF No. 34). The court will address
22 each motion in turn.

23 **II. Discussion**

24 As a preliminary matter, in two separate motions, Johnson requests oral argument
25 on defendants' motion to revoke his pauper status and motion for sanctions, as well as
26 on his countermotion for sanctions. (ECF Nos. 28, 31). Pursuant to Local Rule 78-1,
27 "[a]ll motions may be considered and decided with or without a hearing," and while a party
28 may request a hearing on the belief that "oral argument may assist the court," the party
must do so by inserting the words "ORAL ARGUMENT REQUESTED below the title of

1 the document on the first page of the motion or response.” LR 78-1. Parties are not
2 permitted to file separate motions requesting a hearing. LR 78-1.

3 Johnson has not requested a hearing in his countermotion for sanctions/response
4 to defendants’ motions, and the court has determined that oral argument is not necessary
5 to resolve the motions presently pending in this action. Accordingly, the court will deny
6 both of Johnson’s motions for oral argument. (ECF Nos. 28, 31).

7 a. *Motion to revoke pauper status*

8 Defendants’ motion to revoke Johnson’s pauper status is governed by 28 U.S.C.
9 § 1915. In pertinent part, section 1915 provides:

10 [A]ny court of the United States may authorize the commencement,
11 prosecution or defense of any suit, action or proceeding, civil or criminal, or
12 appeal therein, without prepayment of fees or security therefor, by a person
13 who submits an affidavit that includes a statement of all assets such
prisoner possesses that the person is unable to pay such fees or give
security therefor.

14 ...
15 A prisoner seeking to bring a civil action or appeal a judgment in a civil
action or proceeding without prepayment of fees or security therefor, in
addition to filing the affidavit filed under paragraph (1), shall submit a
certified copy of the trust fund account statement (or institutional equivalent)
for the prisoner for the 6-month period immediately preceding the filing of
the complaint or notice of appeal, obtained from the appropriate official of
each prison at which the prisoner is or was confined.

16 28 U.S.C. § 1915(a)(1)–(2).

17 “The statutory benefit of 28 U.S.C. 1915, enabling a party, under some
18 circumstances, to proceed in forma pauperis in civil actions in the federal courts, is
19 conferred as a privilege only, not as a matter of right.” *Williams v. Field*, 394 F.2d 329,
332 (9th Cir. 1968). “Because in forma pauperis status is a privilege, it follows that the
privilege may be revoked when the goals of section 1915 are not being furthered.”
Murphy v. Jones, 801 F.Supp. 283, 288 (E.D. Mo. 1992).

20 Here, defendants have presented evidence that a \$22,500.00 settlement, received
21 by Johnson in November 2017, was deposited into his Trust2 inmate account (“Trust2
22 account”), and that he currently has \$2,764.46 remaining in that account. (ECF No. 12-
23

1 at 26, 30). Defendants argue that based on these figures, Johnson should be required
2 to pay the remainder of the filing fee within thirty days. (ECF No. 12). Johnson does not
3 dispute these figures, but rather contends that only his monthly income should be
4 considered in determining whether he can afford the filing fee. (ECF No. 15). Johnson
5 argues that based on his monthly income, he should be ordered to pay no more than
6 \$8.44 per month toward his filing fee. *Id.*

7 Johnson filed his IFP application on June 18, 2018. (ECF No. 1). At that time, he
8 had approximately \$11,800.00 in his Trust2 account, but on his IFP application, he
9 disclosed that he had only \$200 in his prison and outside checking and savings accounts.
10 *Id.* Because Johnson was not “unable to pay [the filing fee] or give security therefor” at
11 the time he filed his IFP application, the court will revoke his pauper status. See 28 U.S.C.
12 § 1915. Johnson’s contention that the court may consider only his monthly income in
13 determining whether to extend or revoke his pauper status is not to the contrary, as the
14 plain language of section 1915 contains no such requirement, and Johnson cites no
15 authority to support this contention otherwise.

16 Accordingly, the court will grant defendants’ motion to revoke Johnson’s pauper
17 status. (ECF No. 12).

18 *b. Cross-motions for sanctions*

19 Defendants also contend that Johnson should be sanctioned for misrepresenting
20 the total value of his checking and savings accounts in his IFP application because the
21 misrepresentation was in bad faith. (ECF No. 13). Defendants note that the financial
22 certificates Johnson submitted with his IFP application indicate that he had approximately
23 \$12,089.00 in his Trust2 account at the time he filed his IFP application, such that he
24 cannot seriously dispute that he knowingly misrepresented his financial situation to the
25 court. *Id.* Defendants also note that Johnson has been declared a vexatious litigant in
26 Nevada state court. *Id.* Defendants request that the court sanction Johnson’s misconduct
27 by dismissing this action with prejudice. *Id.*

28 Johnson responds that he was not required to disclose the funds in all of his prison
accounts and that he has never done so in the ten (10) years he has been filing IFP

1 applications. (ECF No. 15). He further responds that his financial representations could
2 not have been false because they were supported by a financial certificate signed by
3 NDOC staff. *Id.* In addition, Johnson notes that he has not been classified as a vexatious
4 litigant in federal court. *Id.*

5 Johnson has also filed a countermotion for sanctions, arguing that defendants
6 brought their motion for sanctions in bad faith to harass and intimidate him. *Id.*
7 Defendants respond that their motion for sanctions is meritorious and not brought for an
8 improper purpose. (ECF No. 24).

9 First, the court finds that Johnson willfully misrepresented the total value of his
10 checking and savings accounts in his IFP application. In the financial certificates attached
11 to his IFP application, it is clear that Johnson had approximately \$12,089.00 in his Trust2
12 account at the time he filed his IFP application. (ECF No. 1 at 8). Accordingly, Johnson
13 cannot deny that he knew he had more than \$200 in his checking and savings accounts
14 when he filed his IFP application.

15 Second, when Johnson signed the IFP application, he acknowledged that the
16 information contained therein was, to his knowledge, true and correct, and that sanctions
17 could be imposed against him if any of the information provided was false or misleading.
18 *Id.* Because his entry of \$200 as the total value of his checking and savings accounts
19 was a false and misleading representation of the actual value contained in his accounts,
20 sanctions may be imposed.

21 Federal courts have inherent power to sanction conduct “which abuses the judicial
22 process.” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44–45 (1991). “Because of their very
23 potency, inherent powers must be exercised with restraint and discretion.” *Id.* at 44.
24 Before imposing sanctions under its inherent authority, “a court must make an explicit
25 finding of bad faith or willful misconduct.” *In re Dyer*, 322 F.3d 1178, 1196 (9th Cir. 2003).

26 Defendants contend that dismissal of this action with prejudice is the appropriate
27 sanction for Johnson’s misconduct. (ECF No. 13). Because dismissal is a drastic
28 sanction, it “is to be imposed only in extreme circumstances.” *Henderson v. Duncan*, 779
F.2d 1421, 1423 (9th Cir. 1986). A district court considering involuntary dismissal under

1 Federal Rule of Civil Procedure 41(b) should weigh: "(1) the public's interest in
2 expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk
3 of prejudice to the defendants; (4) the public policy favoring disposition of cases on their
4 merits; and (5) the availability of less drastic measures." *Yourish v. Cal. Amplifier*, 191
5 F.3d 983, 990 (9th Cir. 1999) (citations omitted). A court need not find that all five factors
6 favor dismissal in order to dismiss a case under Rule 41(b). *Id.*

7 The court finds that dismissal with prejudice is not warranted by Johnson's
8 misconduct. The first and second *Yourish* factors weigh in favor of dismissal, but there
9 is little to no prejudice to defendants in allowing Johnson to pay the full filing fee and
10 continue to prosecute this case. Further, public policy favors disposition of this case on
11 its merits, and there are less severe sanctions available, such as dismissal without
12 prejudice, monetary sanctions, or disciplinary proceedings through the Nevada
13 Department of Prisons. There are thus two factors in favor of, and three factors against,
14 involuntary dismissal.

15 Accordingly, the court finds that dismissal of this action is inappropriate. Moreover,
16 because Johnson will be required to pay the full filing fee before he may proceed in this
17 action, the court will not impose sanctions at this time. Defendants' motion for sanctions
18 (ECF No. 13) will therefore be denied. Johnson is warned that any future failure to provide
19 true and correct information in an IFP application may result in sanctions, which may
20 include involuntary dismissal pursuant to Rule 41(b).

21 Johnson's counter motion for sanctions will also be denied. Johnson's
22 counter motion is rife with allegations of frivolity, maliciousness, and bad faith, none of
23 which are supported by the evidence. In having concluded that Johnson's pauper status
24 should be revoked and that Johnson willfully misrepresented the total value of his
25 checking and savings accounts in his IFP application, the court necessarily finds that
26 defendants' motion to revoke Johnson's pauper status and motion for sanctions were not
27 brought "in bad faith, vexatiously, wantonly, or for oppressive reasons." See *Chambers*,
28 501 U.S. at 45–46. Accordingly, Johnson's counter motion for sanctions (ECF No. 15) will
be denied.

1 c. *Motion for partial summary judgment and motion to deny partial summary*
2 *judgment*

3 The court next turns to Johnson's motion for partial summary judgment and
4 defendants' motion to deny Johnson's motion for partial summary judgment. (ECF Nos.
5 33, 34). “[W]hen a properly supported motion for summary judgment is made, the
6 adverse party ‘must set forth specific facts showing that there is a genuine issue for trial.’”
7 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (quoting Fed. R. Civ. P. 56).
8 The Supreme Court noted that “[t]his requirement in turn is qualified by [Rule 56(d)’s]
9 provision that summary judgment be refused where the nonmoving party has not had the
10 opportunity to discover information that is essential to his opposition.” *Id.* at 250 n.5.

11 Federal Rule of Civil Procedure 56(d) provides that, prior to the entry of summary
12 judgment, the opposing party must have had a sufficient opportunity to discover
13 information essential to its opposition. Fed. R. Civ. P. 56(d); see also *Portland Retail*
14 *Druggists Ass’n v. Kaiser Found. Health Plan*, 662 F.2d 641, 645 (9th Cir. 1981) (“Implicit
15 in the opportunity to respond is the requirement that sufficient time be afforded for
16 discovery necessary to develop facts essential to justify a party’s opposition to the motion
17 [for summary judgment].”). Pursuant to Rule 56(d), “[i]f a nonmovant shows by affidavit
18 or declaration that, for specified reasons, it cannot present facts essential to justify its
19 opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to
20 obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate
21 order.” Fed. R. Civ. P. 56(d).

22 Defendants contend that Johnson’s motion for partial summary judgment is
23 premature because (1) the court has not yet ruled on defendants’ motion to revoke
24 Johnson’s pauper status and motion for sanctions, and (2) discovery is not set to close in
25 this case until March 10, 2020. (ECF No. 34). Defendants submit that they have “not
26 had an opportunity to adequately prepare their defense or engage in discovery” due to
27 the number of defendants being represented by the attorney general’s office and the
28 resources required to answer Johnson’s numerous interrogatories, requests for
admissions, and requests for document production and disclosure. *Id.*

1 Defendants indicate that they have not had sufficient time to investigate or develop
2 the following issues:

- 3 • Whether defendants Dzurenda, Williams, Calderin, Nash, and Bean all
4 personally participated in the decision to deny Johnson's request to congregate
5 in a unit activity rooms five (5) times a day to pray.
- 6 • Whether Johnson's religious exercise was "substantially burdened" by the
7 restriction or instead subject to a "mere inconvenience."
- 8 • Whether the restriction is reasonably related to a legitimate penological interest,
9 including safety and security interests.
- 10 • Whether Johnson exhausted his administrative remedies.

11 *Id.*

12 The court finds that Rule 56(d) does not justify denial of Johnson's motion for
13 partial summary judgment as premature. While defendants appear to have had
14 insufficient time to investigate certain issues, they are in control of most of the pertinent
15 evidence, and have therefore had a sufficient opportunity, for the purposes of Rule 56(d),
16 to discover information essential to their opposition. Accordingly, the court will deny
17 defendants' motion (ECF No. 34) insofar as defendants seek dismissal of Johnson's
18 motion for partial summary judgment.

19 However, defendants have shown good cause for an extension of time to respond
20 to Johnson's motion for partial summary judgment. The court will therefore grant
21 defendants' motion (ECF No. 34) insofar as defendants request an extension of time to
22 respond to Johnson's motion for partial summary judgment.

23 **III. Conclusion**

24 Accordingly,

25 **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that defendants' motion
26 to revoke Johnson's pauper status (ECF No. 12) be, and the same hereby is, GRANTED.
27 Johnson is ordered to pay the full \$350 filing fee within thirty (30) days of the date of this
28 order. Failure to do so will result in dismissal of this action without prejudice.

1 IT IS FURTHER ORDERED that defendants' motion for sanctions (ECF No. 13)
2 be, and the same hereby is, DENIED.

3 IT IS FURTHER ORDERED that Johnson's countermotion for sanctions (ECF No.
4 15) be, and the same hereby is, DENIED.

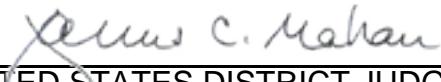
5 IT IS FURTHER ORDERED that Johnson's "motion for oral arguments on all
6 pending motions" (ECF No. 28) be, and the same hereby is, DENIED.

7 IT IS FURTHER ORDERED that Johnson's second motion for "oral argument on
8 all pending motions" (ECF No. 31) be, and the same hereby is, DENIED.

9 IT IS FURTHER ORDERED that defendants' motion to deny Johnson's motion for
10 partial summary judgment, or alternatively, for an extension of time to file an opposition
11 to Johnson's motion for partial summary judgment (ECF No. 34) be, and the same hereby
12 is, GRANTED in part and DENIED in part. Defendants' motion is DENIED insofar as
13 defendants seek dismissal of Johnson's motion for partial summary judgment.
14 Defendants' motion is GRANTED insofar as defendants request an extension of time to
15 respond to Johnson's motion for partial summary judgment.

16 IT IS FURTHER ORDERED that defendants shall have up to and including
17 January 30, 2019 to file their response to Johnson's motion for partial summary judgment
(ECF No. 33).

18 DATED January 23, 2020.

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UNITED STATES DISTRICT JUDGE
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